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# ANTARCTIC WHALING: AUSTRALIA'S ATTEMPT TO PROTECT WHALES IN THE SOUTHERN OCEAN

DONALD K. ANTON\*

**Abstract:** This Article examines Australia's attempt to protect whales in the Antarctic Southern Ocean, in an area that almost all states consider beyond national jurisdiction. Such an examination is important because of the apparently intractable divide on the issue in the International Whaling Commission. The Article begins by outlining the evolution of the Australian cultural and legal posture toward whaling. It also sets out current Australian whaling law, including the establishment of the Australian Whale Sanctuary in the Exclusive Economic Zone of the Australian mainland and external territories (including the purported Australian Antarctic Territory in the Southern Ocean). The Article then analyzes how municipal litigation has been deployed as a protection strategy in Australian courts by NGOs in an attempt to protect whales in the Antarctic Southern Ocean. The Article then turns attention to significant legal limits and problems connected to this strategy. Finally, the Article concludes by highlighting the benefits and costs associated with the unilateral Australian legal approach in the Southern Ocean.

## INTRODUCTION

This paper considers the effectiveness of the unilateral actions of a self-styled “middle power”—in this case Australia—for the protection of whales. It is important to reflect on the individual activities of a state like Australia because the long-running stalemate under the International Convention for the Regulation of Whaling (ICRW) between the anti-whaling forces and pro-whaling forces is, in my view, probably as good as it gets for the foreseeable future. The standoff represents, as

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David Victor suggests, a Pareto-optimal situation—even if the situation is messy and unstable.<sup>1</sup> If either side were to achieve the totality of its ambitions in the International Whaling Commission (IWC), it is likely that it would spell the end of the ICRW as the accepted global mechanism for international cooperation and coordination on whaling.<sup>2</sup> Indeed, at the 2007 IWC meeting, the Japanese delegation announced that it was considering withdrawal from the treaty and the Commission altogether after years of condemnation and acrimony.<sup>3</sup> If the ICRW stalemate is as good as it gets for international regulation of whaling, then our best hope for whale protection probably lies, at least for now, outside the IWC and, as I say, it becomes important to analyze and compare the various approaches of individual states.

One of the fundamental, long-term threats to whales in the Southern Ocean remains the so-called scientific whaling carried out by Japan under the second phase of its Whale Research Program under Special Permit in the Antarctic (JARPA II).<sup>4</sup> Japan first introduced its Whale Research Program under Special Permit in the Antarctic (JARPA) in

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<sup>1</sup> David G. Victor, *Whale Sausage: Why the Whaling Regime Does Not Need to Be Fixed*, in TOWARD A SUSTAINABLE WHALING REGIME 292, 304 (Robert L. Friedheim ed., 2001).

<sup>2</sup> Some have argued that under Articles 65 and 120 of the United Nations Law of the Sea Convention the ICRW is the only “appropriate international organization” that states can “work through” to meet their duty to cooperate on the conservation, management, and study of cetaceans. JOSE A. DE YTURRIAGA, THE INTERNATIONAL REGIME OF FISHERIES: FROM UNCLOS TO THE PRESENTIAL SEA 131 (1997). The implication seems to be that the duty to cooperate is breached by those states that withdraw from the ICRW. See Jon M. Van Dyke, *Sharing Ocean Resources—In a Time of Scarcity and Selfishness*, in LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES 3, 21 (Harry N. Scheiber ed., 2000). As William Burke points out, this argument ignores the fact that Article 65 (and *mutatis mutandis* Article 120) is in the plural and refers to “appropriate international organizations,” indicating that the drafters had in mind the possibility of more than one avenue to cooperate on cetaceans—large and small. William T. Burke, *A New Whaling Agreement and International Law*, in TOWARD A SUSTAINABLE WHALING REGIME, *supra* note 1, at 51, 54–55; see also Third United Nations Conference on the Law of the Sea, Ninth Session, New York, U.S., Feb. 27–Apr. 4, 1980, *U.S. Delegation Report* (Article 65 “enhances the role of the [IWC] (or a successor organization) especially, but not exclusively, with regard to whales.”), quoted in Kimberly S. Davis, Note, *International Management of Cetaceans Under the New Law of the Sea Convention*, 3 B.U. INT’L L.J. 477, 512 (1985) (emphasis added).

<sup>3</sup> See *The World Today: Japan Threatens to Leave International Whaling Commission*, (Australian Broadcasting Corporation television broadcast June 1, 2007), available at <http://www.abc.net.au/worldtoday/content/2007/s1939858.htm>.

<sup>4</sup> See generally Int’l Whaling Commission [IWC] Scientific Comm. Meeting, Ulsan, S. Korea, May 30–June 17, 2005, *Plan for the Second Phase of the Japanese Whale Research Program Under Special Permit in the Antarctic (JARPA II)—Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources*, IWC Doc. SC/57/01 (2006) (prepared by the Government of Japan) (providing detailed information on the JARPA II research program), available at <http://www.icrwhale.org/eng/SC5701.pdf>. The Japanese Institute of Cetacean Research (ICR) oversees JARPA II.

the 1987–88 Southern Ocean whaling season.<sup>5</sup> The principal focus of JARPA was Antarctic minke whales, with an initial take of  $300 \pm 10\%$  each season.<sup>6</sup> Since the 1995–96 season, the annual take has increased to  $400 \pm 10\%$ .<sup>7</sup> Through the 2004–05 season, an eighteen year period, over 6800 Antarctic minke whales were taken in Antarctic waters under JARPA; a very large number when compared to a total of 840 whales taken globally by Japan for scientific research in the thirty-one year period prior to the IWC commercial whaling moratorium.<sup>8</sup> It is widely reported that much of the whale meat generated by JARPA (and now JARPA II) winds up in fish markets and on dinner plates, or even as pet food.<sup>9</sup>

JARPA II commenced with a two-year feasibility study in June of 2005.<sup>10</sup> JARPA II has four stated program objectives: “(1) monitoring of the Antarctic ecosystem; (2) modelling competition among whale species and developing future management objectives; (3) elucidation of temporal and spatial changes in stock structure; and (4) improving the management procedure for Antarctic minke whale stocks.”<sup>11</sup> The program’s reach has expanded from JARPA to include the lethal study of humpback and fin whales.<sup>12</sup> It also continues and increases the take of minke whales, which were the only whales killed under JARPA.<sup>13</sup> JARPA II also leaves open the possibility of “studying” (*i.e.*, taking) other whale species that feed on Antarctic krill, although no other species are specifically mentioned.<sup>14</sup>

The JARPA II program sets forth the current Japanese lethal limits on whale killing in the Antarctic. During the two-year feasibility study, the maximum number of permitted kills was  $850 \pm 10\%$  minke whales

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<sup>5</sup> Tim Stephens & Donald R. Rothwell, *Japanese Whaling in Antarctica*: Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd., 16 REV. EUR. COMMUNITY & INT’L ENVTL. L. 243, 243 (2007).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Resolution on JARPA II, IWC Res. 2005-1 (2005), <http://www.iwcoffice.org/meetings/resolutions/Resolution2005-1.pdf> [hereinafter Resolution on JARPA II]; see Stephens & Rothwell, *supra* note 5, at 243.

<sup>9</sup> See Peter Heller, Opinion, *Japan’s Whaling Shame*, L.A. TIMES, Dec. 3, 2007, at A17; *Anger over Whale Pet Food Claims*, BBC NEWS, Feb. 16, 2006, <http://news.bbc.co.uk/1/hi/sci/tech/4700418.stm>.

<sup>10</sup> IWC, 59th Annual Meeting of the IWC, Anchorage, U.S., May 28–31, 2007, [Revised] Chair’s Summary Report of the 59th Annual Meeting, at 4 n.3, [http://www.iwcoffice.org/\\_documents/meetings/ChairSummaryReportIWC59rev.pdf](http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf) [hereinafter *Chair’s Summary Report of the 59th Annual Meeting*].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4–5 n.3.

<sup>13</sup> *Id.* at 4 nn.2–3.

<sup>14</sup> *Id.* at 4–5 n.3.

and 10 fin whales.<sup>15</sup> The maximum for the full program, which commenced in 2007–08, is 850  $\pm$ 10% minke whales, 50 fin whales, and 50 humpback whales.<sup>16</sup> The addition of fin and humpback whales is a significant development and major worry. Humpback whales are listed as Annex I species (most threatened) under the Convention on International Trade in Endangered Species.<sup>17</sup> Fin whales are listed as endangered on the World Conservation Union (IUCN) Red List.<sup>18</sup> Another concern lies in the fact that species of these whales that are sampled might include whales that live in depleted breeding populations.<sup>19</sup> The permitted amount of minke whale killings has more than doubled under JARPA II.<sup>20</sup> Under the lethal component of the program in 2006–07, 505 Antarctic minke whales and three fin whales were killed.<sup>21</sup> In 2007, a total of 551 Antarctic minke whales were taken under the JARPA II program.<sup>22</sup> No fin or humpback whales were killed.<sup>23</sup>

In 2005, at the annual meeting of IWC, Japan sought approval for JARPA II, which as indicated, more than doubles its “scientific” whaling in the Antarctic Southern Ocean. It should be noted that the IWC established the Southern Ocean Whale Sanctuary in the Southern Ocean in 1994 (although this Sanctuary is not recognized by and does not apply to Japan because it lodged an objection within the prescribed period under Article V.3 of the ICRW).<sup>24</sup> The IWC rejected approval of

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<sup>15</sup> *Id.* at 5 n.3.

<sup>16</sup> *Chair’s Summary Report of the 59th Annual Meeting*, *supra* note 10, at 5 n.3.

<sup>17</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. II, app. I, *opened for signature* Mar. 3, 1973, *available at* <http://www.cites.org/eng/app/EJul01.pdf>.

<sup>18</sup> S.B. REILLY ET AL., INT’L UNION FOR THE CONSERVATION OF NATURE, IUCN RED LIST OF THREATENED SPECIES: BALAENOPTERA PHYSALUS (2008), <http://www.iucnredlist.org/details/2478>.

<sup>19</sup> Resolution on JARPA, IWC Res. 2007-1, <http://www.iwcoffice.org/meetings/resolutions/Resolution2007-1.pdf> [hereinafter Resolution on JARPA].

<sup>20</sup> *Id.*

<sup>21</sup> Press Release, IWC, Day 3 of the International Whaling Commission’s 59th Annual Meeting in Anchorage, USA (May 30, 2007), <http://www.iwcoffice.org/meetings/meeting2007.htm> [hereinafter Day 3 IWC 2007 Press Release].

<sup>22</sup> Press Release, IWC, Day 3 of the International Whaling Commission’s 60th Annual Meeting in Santiago, Chile (June 25, 2008), <http://www.iwcoffice.org/meetings/meeting2008.htm> [hereinafter Day 3 IWC 2008 Press Release].

<sup>23</sup> *See id.* In December 2007, Japan announced that it would suspend, for two to three years, its planned hunt of humpback whales. Alan Goodall, Opinion, *Inflammatory Actions at Sea*, JAPAN TIMES, Jan. 1, 2008, *available at* <http://search.japantimes.co.jp/cgi-bin/eo20080101a4.html>.

<sup>24</sup> International Convention for the Regulation of Whaling, schedule, ¶ 7(b) n.\*\*, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, *available at* [http://www.iwcoffice.org/\\_documents/commission/schedule.pdf](http://www.iwcoffice.org/_documents/commission/schedule.pdf).

JARPA II. By Resolution 2005-1 (passed by a majority of thirty votes to twenty-seven votes with one abstention), the IWC “strongly urge[d] the Government of Japan to withdraw its JARPA II proposal.”<sup>25</sup> Nonetheless, Japan has continued to issue special permits for scientific whaling under JARPA II.

Resolution 2007-1, adopted at the IWC annual meeting in 2007, reiterated IWC concern about the special permit system and specifically Japan’s institution of the JARPA II program. This resolution explained IWC concerns about the program and its skepticism about the scientific purposes of JARPA II.<sup>26</sup> It specifically criticized the expansion of the program to fin whales and humpback whales and the doubling of the take for minke whales.<sup>27</sup> The Resolution concluded with a request that Japan indefinitely cease to implement the lethal components of JARPA II and adopt multiple policy recommendations suggested by the IWC.<sup>28</sup> New Zealand proposed the resolution and numerous other countries sponsored it, including Australia, Great Britain, and the United States.<sup>29</sup> The resolution received forty votes in favor, two against, with one abstaining.<sup>30</sup> Japan and twenty-six other states refused to participate in the process because they believed the resolution was counter-productive to its efforts to “normalize” whaling within the IWC.<sup>31</sup> The principal development regarding special permit whaling at the 2008 IWC annual meeting was the formal agreement upon a method for reviewing permit applications—including

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<sup>25</sup> Resolution on JARPA II, *supra* note 8; Press Release, IWC, Day 3 of the International Whaling Commission’s 57th Annual Meeting in Ulsan, S. Korea (June 22, 2005), <http://www.iwcoffice.org/meetings/meeting2005.htm#day3>.

<sup>26</sup> See Resolution on JARPA, *supra* note 19.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> IWC, 59th Annual Meeting of the IWC, Anchorage, U.S., May 28–31, 2007, *Agenda Item: Resolution on JARPA*, at 1, Doc. IWC/59/27 (May 29, 2007) (*prepared by the Government of New Zealand*), [http://www.iwcoffice.org/\\_documents/commission/IWC59docs/59-27.pdf](http://www.iwcoffice.org/_documents/commission/IWC59docs/59-27.pdf).

<sup>30</sup> Day 3 IWC 2007 Press Release, *supra* note 21.

<sup>31</sup> See *id.* Normalization refers to the attempt by Japan and other whaling nations to have the IWC return to its roots as an organization designed to manage sustainable commercial whaling, as opposed to retaining the moratorium on commercial whaling in perpetuity. See IWC, 59th Annual Meeting of the IWC, St. Kitts and Nevis, June 16–20, 2006, *Agenda Item 19: Normalizing the International Whaling Commission*, at 1–2, Doc. IWC/58/12 (June 16, 2006), [http://www.iwcoffice.org/\\_documents/commission/IWC58docs/58-12.pdf](http://www.iwcoffice.org/_documents/commission/IWC58docs/58-12.pdf); Conference on Normalization of the International Whaling Commission, Tokyo, Japan, February 13–15, 2007, *Chair’s Summary*, at 1, Doc. IWC-M08-INFO2, [http://www.iwcoffice.org/\\_documents/commission/future/IWC-M08-INFO2.pdf](http://www.iwcoffice.org/_documents/commission/future/IWC-M08-INFO2.pdf). See generally Mike Iliff, *Normalization of the International Whaling Commission*, 32 MARINE POL’Y 333 (2008) (discussing the progress of “normalization”).

the JARPA II program.<sup>32</sup> A small, independent expert workshop was held in September 2008 to review new proposals, and to review the results of existing proposals—including the JARPA II program.<sup>33</sup> The impasse within the IWC, however, appears as intractable as it has ever been. As several astute scholars observe:

Despite severe condemnation of its whaling policies, Japan hews to the position that whaling is no longer an issue of species conservation as was the situation in the 1960s and 1970s, when several whale species had been over-harvested and effective measures to protect the endangered species were urgently needed. The government of Japan maintains that most of the eighty-plus species of whales are not endangered and that many species are abundant and increasing. . . .

. . . Japan consistently adheres to its official position that its opting out of the IWC regulations and its disregard of the moratorium are justified because Japanese whaling is exclusively for “scientific research” purposes and consists of regulated catches of whale species that Japan deems not endangered.<sup>34</sup>

Given the logjam in the IWC, can anti-whaling states working outside the Commission get any better purchase on the issue? The remainder of this paper considers the individual initiatives of Australia outside the IWC.<sup>35</sup> In Section I, I outline the evolution of the Australian posture toward whaling. I also describe Australian whaling law, including the establishment of the Australian Whale Sanctuary in the Exclusive Economic Zone of the Australian mainland and external terri-

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<sup>32</sup> Day 3 IWC 2008 Press Release, *supra* note 22; see IWC, 2008 IWC Scientific Committee Meeting, Santiago, Chile, June 1–13, 2008, *Scientific Committee Report—Annex P: Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits*, (June 21, 2008), [http://www.iwcoffice.org/\\_documents/sci\\_com/SCRepfiles2008/Annex%20P%20FINALsq.pdf](http://www.iwcoffice.org/_documents/sci_com/SCRepfiles2008/Annex%20P%20FINALsq.pdf).

<sup>33</sup> Day 3 IWC 2008 Press Release, *supra* note 22; see INT’L FUND FOR ANIMAL WELFARE, THE 33 ITEMS FOR CONSIDERATION BY THE SMALL WORKING GROUP (2008), <http://www.stopwhaling.org> (follow “Download IFAW’s Briefing on the 33 Items under discussion at this meeting” hyperlink).

<sup>34</sup> Harry N. Scheiber, Kathryn J. Mengerink & Yann-huei Song, *Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IUU Fishing Conundrum*, 30 U. HAW. L. REV. 97, 158 (2007).

<sup>35</sup> Australia continues to work within the IWC, too, most recently releasing a white paper on IWC reform. GOV’T OF AUSTL., WHALE CONSERVATION AND MANAGEMENT: A FUTURE FOR THE IWC (2008), available at <http://www.environment.gov.au/coasts/pub-lications/pubs/iwc-future-paper.pdf>.

tories (including the purported Australian Antarctic Territory). In Section II, I analyze how municipal litigation<sup>36</sup> has been deployed as a protection strategy in Australian courts by NGOs in an attempt to protect whales in the Antarctic Southern Ocean. Section III then turns attention to potential legal limits and problems connected to this strategy. I conclude by highlighting the benefits and costs associated with the unilateral Australian legal approach in the Southern Ocean.

## I. THE AUSTRALIAN REGULATION OF WHALING

For most of its history Australia was a significant whaling nation.<sup>37</sup> This is perhaps not surprising given its proximity to the major whaling waters of the Southern Ocean and the strong economic incentive formerly involved. From the early nineteenth century through the 1960s, the Australian colonies (and later states) of Tasmania, South Australia, Victoria, New South Wales and Western Australia were engaged in whaling, sometimes very heavily, and established numerous onshore whaling stations.<sup>38</sup> Australia began shifting its whaling policy in 1978 to fa-

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<sup>36</sup> There has also been consideration by Australia (and New Zealand) of international legal action in either the International Court of Justice or the International Tribunal for the Law of the Sea to challenge the right of Japan to engage in so-called special permit scientific whaling under Art. VIII of the ICRW and abuse of such a right. Press Release, Kevin Rudd, Federal Labor Leader & Peter Garrett, Shadow Minister for Climate Change, Environment and Heritage, Federal Labor's Plan To Counter International Whaling 1 (May 19, 2007), available at [http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/ZG4N6/upload\\_binary/zg4n62.pdf](http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/ZG4N6/upload_binary/zg4n62.pdf) ("Federal Labor's plan will . . . [t]ake Japan to international courts such as the International Court of Justice or the International Tribunal for the Law of the Sea to end the slaughter of whales."). See generally Andrew Hutchinson, *Baleen Out the IWC: Is International Litigation an Effective Strategy for Halting the Japanese Scientific Whaling Program*, 3 MACQUARIE J. INT'L & COMP. ENVTL. L. 1, 16–19 (2006) (discussing International Court of Justice and the United Nations Convention on the Law of the Sea (UNCLOS)); Gillian Triggs, *Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?*, 5 ASIA PAC. J. ENVTL. L. 33 (2000) (discussing judicial remedies for abuse of rights). On October 20, 2008, in testimony before the Australian Senate Standing Committee on Legal and Constitutional Affairs, the Attorney-General First Assistant Secretary of the Office of International Law stated that the Australian Government was still considering whether to commence international legal proceedings and to undertake further surveillance during the 2008–09 Southern Ocean whaling season. *Estimates (Supplementary Budget Estimates): Hearings before S. Standing Comm. on Legal and Constitutional Affairs*, 42nd Parl. 56–57 (Proof Comm. Hansard 2008) (statement of Bill Campbell, QC, First Assistant Secretary, Office of International Law).

<sup>37</sup> See generally MAX COLWELL, *WHALING AROUND AUSTRALIA* (1969) (surveying the history of whaling in Australia); WILLIAM JOHN DAKIN, *WHALEMEN ADVENTURERS: THE STORY OF WHALING IN AUSTRALIAN WATERS AND OTHER SOUTHERN SEAS RELATED THERETO, FROM THE DAYS OF SAILS TO MODERN TIMES* (1934) (same).

<sup>38</sup> See 1 COMMONWEALTH OF AUSTRALIA, *WHALES AND WHALING: REPORT OF THE INDEPENDENT INQUIRY CONDUCTED BY THE HON. SIR SYDNEY FROST* (Austl. Gov't Publ'g Serv. 1978), 26–37. The Inquiry is often referred to as the "Frost Inquiry."



vor the protection of whales.<sup>39</sup> By 1989, it was staunchly anti-whaling with an uncompromising “policy of complete protection for all whales . . . .”<sup>40</sup> It is today one of the vanguard anti-whaling states, deploying a mix of municipal and international law, diplomacy, and policy instruments to promote a complete and permanent ban on all whaling.

Because of historical development and the Australian federal division of maritime jurisdictional competence, the legal regulation of whales in Australia has been a federal affair of concurrent jurisdiction—a matter over which both the states and the Commonwealth Government legislated.<sup>41</sup> Indeed, prior to Federation, what regulation existed was provided by the Imperial Parliament of Great Britain<sup>42</sup> and the Australian colonies<sup>43</sup> together. The first Australian Commonwealth federal legislation, the Whaling Act 1935, followed the 1931 Convention for the Regulation of Whaling and established a system of licensing.<sup>44</sup> It was amended by the Whaling Act 1935-1948 (No. 66) to give effect to the 1946 ICRW.<sup>45</sup> Section 4 of the Act, presaging contemporary Australian jurisdictional stretch, extended the Convention to: “Australian waters beyond territorial limits to the Territories of the

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<sup>39</sup> The Frost Inquiry prompted a “change in [Australian] policy from one of conservative utilisation of whale stocks . . . to one committed to a vigorous and active policy of protection of whales . . . .” NAT’L TASK FORCE ON WHALING, COMMONWEALTH OF AUSTL., A UNIVERSAL METAPHOR: AUSTRALIA’S OPPOSITION TO COMMERCIAL WHALING 61 (Env’t Austl. 1997) (quoting Prime Minister Malcolm Fraser’s formal response to the Frost Inquiry on April 4, 1979) [hereinafter A UNIVERSAL METAPHOR], available at <http://www.environment.gov.au/coasts/publications/whaling/pubs/whaling.pdf>.

<sup>40</sup> R.L.J. HAWKE, PRIME MINISTER OF AUSTL., OUR COUNTRY, OUR FUTURE: STATEMENT ON THE ENVIRONMENT 24 (1989).

<sup>41</sup> See, e.g., Whales Protection Act, 1988 (Tas.); Act. No 39, 1935 (Queensl.), discussed in J.E. Broadbent, *Queensland*, 19 J. COMP. LEGIS. & INT’L L. (3rd ser.) 68, 69 (1937); Act No. 2361, 1937 (S. Austl.), discussed in E.L. Bean, *South Australia*, 21 J. COMP. LEGIS. & INT’L L. (3rd ser.) 73, 76 (1939); Act. No. 42, 1925 (Tas.), discussed in C.E.A. Bedwell, *Tasmania*, 9 J. COMP. LEGIS. & INT’L L. (3rd ser.) 100, 101 (1927); Act No. 15, 1937 (W. Austl.), discussed in C.E. Stow, *Western Australia*, 21 J. COMP. LEGIS. & INT’L L. (3rd ser.) 81, 82 (1939).

<sup>42</sup> See, e.g., Southern Whale Fishery Act, 55 Geo. 3, c. 45 (1815) (Eng.); Southern Whale Fishery Act, 51 Geo. 3, c. 34 (1811) (Eng.); Southern Whale Fishery Act, 42 Geo. 3, c. 18 (1802) (Eng.); Southern Whale Fishery Act, 26 Geo. 3, c. 50 (1786) (Eng.).

<sup>43</sup> See, e.g., DAKIN, *supra* note 37, at 33–34 (discussing Tasmanian Act Regulating Whaling, 1838 (Tas.)); Stow, *supra* note 41, at 82 (discussing the repeal of the Whaling Ordinance of 1860 (W. Austl.) by Act No. 15, 1937 (W. Austl.)).

<sup>44</sup> The 1935 Act also followed the Whaling Industry (Regulation) Act 1934 (U.K.), which is one of the few Acts of the United Kingdom Parliament extending the legislative powers of the Australian Commonwealth Parliament. See J.Q. Ewens, Book Review, 1 FED. L. REV. 165, 167 (1964) (reviewing GEOFFREY SAWER, AUSTRALIAN FEDERAL POLITICS AND LAW 1929–49 (1963)).

<sup>45</sup> J.Q. Ewens, *Australia: Commonwealth of Australia*, 32 J. COMP. LEGIS. & INT’L L. (3d ser.) 60, 69 (1950) (discussing Whaling Act (No. 66), 1950, (Austl.)).

Commonwealth, to ships registered in Australia, whether or not such ships are in Australian waters of a Territory of the Commonwealth, and to all ships over which the Commonwealth has jurisdiction."<sup>46</sup> Following the passage of Australian whaling regulations under the Act, the Japanese Government registered its protest of the regulations as they might be applied in Antarctica.<sup>47</sup> The extraterritorial application of the Act, however, was unclear and the Act was rarely enforced in the Australian Antarctic Territory (AAT).<sup>48</sup>

The Whaling Industry Act 1949 also followed the 1946 ICRW and created the Australian Whaling Commission (AWC).<sup>49</sup> The Act, however, was not intended to implement the Convention per se. Instead, the AWC was to develop and coordinate whaling in Australia, especially Western Australia.<sup>50</sup> The AWC was empowered to commence whaling as an instrumentality of the Australian Government using a whaling station at Babbage Island, off the coast from Carnarvon, Western Australia.<sup>51</sup> The AWC's life was short, however, and the operation was sold in 1956 and the Act was repealed that same year.<sup>52</sup>

Four years later, in 1960, the next piece of federal legislation bearing on whales was enacted.<sup>53</sup> Like the 1935 Commonwealth legislation, the Whaling Act 1960 was concerned with the rational exploitation of whales and the regulation of whaling through licenses and permits for whalers. It also had application to waters offshore the AAT, in a manner similar to the 1935 Act,<sup>54</sup> but again, was never enforced against non-Australian nationals.

Over the next 18 years, public and official sentiment about whaling became strongly oppositional. In 1980, two years after the Frost Inquiry into Whales and Whaling, the Australian Parliament repealed the Whaling Act 1960 and replaced it with the Whale Protection Act 1980.

<sup>46</sup> Whaling Act (No. 66), 1935–48 § 4 (Austl.), *quoted in* Gillian Triggs, *Australian Sovereignty in Antarctica—Part II*, 13 MELB. U. L. REV. 302, 309 (1982).

<sup>47</sup> R.A. SWAN, *AUSTRALIA IN THE ANTARCTIC: INTEREST, ACTIVITY AND ENDEAVOUR* 222 (1961).

<sup>48</sup> See Triggs, *supra* note 46, at 309.

<sup>49</sup> Whaling Industry Act, 1949 (Austl.).

<sup>50</sup> See COLWELL, *supra* note 37, at 152–53.

<sup>51</sup> See Mark B. Orams & Paul H. Forestell, *From Whale Harvesting to Whale Watching: Tangalooma 300 Years On*, in *RECENT ADVANCES IN MARINE SCIENCE AND TECHNOLOGY '94*, at 667, 668 (Orpha Bellwood, Howard Choat & Narendra Saxena eds., 1994).

<sup>52</sup> Whaling Industry Act Repeal Act, 1956 (Austl.); COLWELL, *supra* note 37, at 162.

<sup>53</sup> Whaling Act, 1960 (Austl.).

<sup>54</sup> See 118 PARL. DEB., H.R. 2931–32 (1980) (statement of Prime Minister Malcolm Fraser during debate on the Whale Protection Act 1980), as reprinted in 8 AUSTL. Y.B. INT'L L. 283, 286 (1983).

Adopting the dramatic national policy change favoring whale protection reflected in the recommendations of the Frost Inquiry, the 1980 Act eschewed the mere regulation of whaling in favor of conservation and prohibited the killing, capturing, injuring, or interfering with cetaceans.<sup>55</sup> In terms of jurisdictional reach, initially the Whale Protection Act 1980 borrowed the Australian Fishing Zone (AFZ) construct from Australian fisheries law<sup>56</sup> as the basis for establishing persons subject to the Act. The Act applied to Australian nationals regardless of location, but only applied to non-nationals when present in the AFZ.<sup>57</sup> While the Act also applied to “every external territory”—including the claimed AAT—waters around the AAT were excluded from the AFZ by the Fisheries Management Act 1991.<sup>58</sup> Thus, no attempt was made to regulate the whaling activities of other states in the Southern Ocean adjacent to the AAT.<sup>59</sup>

The Whale Protection Act 1980 also made its application subservient to “the obligations of Australia under international law, including obligations under any [international] agreement between Australia and another country or countries.”<sup>60</sup> In the context of whale protection in the Southern Ocean this meant that it was not intended to apply to whaling activities that were in conformity with the ICRW. It presumably also meant that jurisdiction over non-nationals would also have to be in conformity with rules established by the Antarctic Treaty System.

Be that as it may, in 1994 Australia formally declared an Exclusive Economic Zone (EEZ) under the 1982 United Nations Convention on the Law of the Sea. The basis of the AFZ was amended to account for this development in the Australian fisheries law.<sup>61</sup> The AFZ was defined to consist of those waters adjacent to Australia and its external territo-

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<sup>55</sup> Whale Protection Act, 1980, § 9 (Austl.).

<sup>56</sup> *Id.* § 6(2); *see* Fisheries Act, 1952, § 4 (Austl.). The AFZ was defined as waters adjacent to Australia and its external Territories out to 200 nautical miles, but excluding “excepted waters” or internal or coastal waters of a state. Fisheries Management Act, 1991, § 4(1) (Austl.); Fisheries Amendment Act, 1978, § 3 (Austl.).

<sup>57</sup> Whale Protection Act, 1980, § 6(2) (Austl.).

<sup>58</sup> *See* H.R. STANDING COMM. ON LEGAL AND CONSTITUTIONAL AFFAIRS, 36TH PARL., AUSTRALIAN LAW IN ANTARCTICA 17 (1992).

<sup>59</sup> This omission was apparently premised on the concern that extending Australian jurisdiction over non-nationals in Antarctic waters would endanger the benefits of cooperation under the 1959 Antarctic Treaty and Australia’s influence within the Treaty system. *See id.* at 18.

<sup>60</sup> Whale Protection Act, 1980, § 6(3) (Austl.).

<sup>61</sup> *See* Maritime Legislation Amendment Act, 1994, sched. 1 (Austl.).

ries (including the AAT) within the EEZ.<sup>62</sup> For fisheries, the 1992 proclamation excepting waters offshore the AAT<sup>63</sup> remained in force under the Fisheries Management Act 1991 following the establishment of the Australian EEZ. The situation, however, changed for whales in the Southern Ocean with the 1994 EEZ declaration. Under the Whale Protection Act 1980, the jurisdictional basis of the Act's operation changed from the AFZ to the EEZ. As a result, all whaling (conducted by nationals and non-nationals alike) in the purported Australian EEZ off the AAT became regulated by Australian law. The Act did, however, remain subordinate to Australia's international legal obligations, including the ICRW and the 1959 Antarctic Treaty.

Australian legal protection for whales was again strengthened in 1999 with the repeal of the Whale Protection Act 1980 and the enactment of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). The EPBC Act takes a comprehensive approach in relation to environmental responsibilities about which the federal government has deemed appropriate to legislate.<sup>64</sup> In connection with whales, the Act follows a recommendation of the 1996 National Task Force on Whaling. The Task Force urged Australia to "work towards the establishment of a global whale sanctuary in all international waters and [EEZs], established under the United National [sic] Convention on the Law of the Sea, up to the territorial seas of each coastal State ... through an appropriate amendment to [the ICRW]."<sup>65</sup>

The EPBC Act takes up the idea of an EEZ whale sanctuary and, in order to "assist in the co-operative implementation of Australia's

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<sup>62</sup> The definition still excluded the coastal waters of a state and proclaimed "excepted waters." See *id.*

<sup>63</sup> Proclamation No. S52 of William Hayden, Governor-General of the Commonwealth of Australia, as republished in COMMONWEALTH OF AUSTRALIA GAZETTE (Canberra, Austl.), Feb. 14, 1992.

<sup>64</sup> See generally CHRIS MCGRATH, REVIEW OF THE EPBC ACT (2006), available at <http://www.environment.gov.au/soc/2006/publications/emerging/epbc-act/pubs/epbc-act.pdf>; Lee Godden & Jacqueline Peel, *The Environment Protection and Biodiversity Conservation Act 1999 (Cth): Dark Sides of Virtue*, 31 MELB. U. L. REV. 106 (2007); Chris McGrath, *Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest*, 25 ENVTL. & PLAN. L. J. 324 (2008); John Connor, *Australia's New Environmental Law—Questions and Answers*, HABITAT AUSTRALIA (Aug. 1999), available at [http://findarticles.com/p/articles/mi\\_hb4727/is\\_/ai\\_n28737967?tag=artBody;coll](http://findarticles.com/p/articles/mi_hb4727/is_/ai_n28737967?tag=artBody;coll).

<sup>65</sup> A UNIVERSAL METAPHOR, *supra* note 39, at x. Peter Bridgewater has argued that the idea that each whale should have sanctuary is beyond the dictates of both what is required by conservation and the precautionary principle. Peter Bridgewater, *Whaling or Wailing?*, 55 INT'L SOC. SCI. J. 555, 558–59 (2003).

international environmental responsibilities,”<sup>66</sup> the Act establishes an Australian Whale Sanctuary (AWS) to help ensure the conservation of whales and other cetaceans.<sup>67</sup> It gives “formal recognition of the high level of protection and management afforded to cetaceans” by the Australian government.<sup>68</sup> It is an offense under the Act to kill, injure, take, interfere with, treat, or possess whales within the AWS.<sup>69</sup> The AWS includes, *inter alia*, all waters of the Australian EEZ (other than coastal waters of a State of the Northern Territory).<sup>70</sup> This includes the waters of the EEZ declared adjacent to the AAT, without exception as to jurisdiction over non-nationals.<sup>71</sup> Moreover, the EBPC Act does not contain any requirement that it must be read subject to Australia’s international obligations.

The EPBC Act contains provisions that permit the Minister for the Environment to make Recovery Plans for listed threatened species or ecological communities.<sup>72</sup> A Recovery Plan must contain research and management actions that help halt the decline of the species or community and assist in its recovery and long-term survival.<sup>73</sup> A Commonwealth agency is prohibited from taking action that would breach a Recovery Plan.<sup>74</sup> To date, five Recovery Plans have been adopted for whales (Blue Whales, Fin Whales, Humpback Whales, Sei Whales, and Southern Right Whales).<sup>75</sup> In each of the Recovery Plans, a threat of primary concern to Australia

is the potential expansion of *de facto* commercial whaling under the guise of scientific whaling. The IWC Convention allows member states to issue special permits to kill whales for research purposes and then process these animals for sale. Since 1986, Japan and Iceland have issued special permits for several whale species as part of their scientific whal-

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<sup>66</sup> Environment Protection & Biodiversity Conservation (EPBC) Act § 3(1)(c) (1999) (Austl.).

<sup>67</sup> *Id.* § 3(2)(c)(ii).

<sup>68</sup> *Id.* § 225(1).

<sup>69</sup> *Id.* §§ 229–230. The offense is punishable by imprisonment up to two years or a fine not exceeding one thousand penalty units or both. *Id.* § 229(2)

<sup>70</sup> *Id.* § 225(2).

<sup>71</sup> *Id.* § 5(4).

<sup>72</sup> EPBC Act § 269A(3) (1999) (Austl.).

<sup>73</sup> *Id.* § 270(1).

<sup>74</sup> *Id.* § 268.

<sup>75</sup> All recovery plans are available online. *See* Recovery Plans Made or Adopted—Common Name Order, <http://www.environment.gov.au/biodiversity/threatened/recovery-list-common.html> (last visited Feb. 19, 2009).

ing research programs. The recent expansion of these programs in the Northern Hemisphere involve the killing of various baleen whales including minke, Bryde's, fin, sperm and sei whales.<sup>76</sup>

In addressing this threat, each Recovery Plan seeks to prevent commercial whaling and the expansion of scientific whaling by continuing to support the bans on direct take of the relevant whales and by maintaining its position on promoting high levels of whale protection in all relevant international agreements, including the ICRW, the Convention on International Trade in Endangered Species, and the Convention on Migratory Species.<sup>77</sup> The Recovery Plans also address threats posed by, *inter alia*, (i) acoustic disturbances, (ii) marine debris and entanglement threats, (iii) potential impacts of tourism and whale watching, (iv) physical disturbance and development activities (such as ship-strike, aquaculture, pollution, recreational boating, and exploration and extraction industries), (v) prey depletion, and (vi) the impact of climate change on the species.<sup>78</sup>

A significant aspect of the EPBC Act lies in its generous grant of third-party enforcement rights.<sup>79</sup> If "a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of [the] Act or the regulations" an "interested person . . . may apply to the Federal Court for an injunction."<sup>80</sup> An "interested person," in the case of an individual, is: (i) an Australian citizen or resident whose interests have been or will be affected by the conduct; or, more importantly, (ii) a citizen or resident who has engaged in environmental conservation or protection activities any time within two years prior to the conduct.<sup>81</sup> In the case of an organization, an "interested person" is defined the same as an interested

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<sup>76</sup> DEP'T OF THE ENV'T & HERITAGE, AUSTRALIAN GOV'T, BLUE, FIN AND SEI WHALE RECOVERY PLAN 2005–2010, at 6 (2005) [hereinafter BLUE, FIN AND SEI WHALE RECOVERY PLAN]; DEP'T OF THE ENV'T & HERITAGE, AUSTRALIAN GOV'T, HUMPBACK WHALE RECOVERY PLAN 2005–2010, at 6 (2005) [hereinafter HUMPBACK WHALE RECOVERY PLAN]; DEP'T OF THE ENV'T & HERITAGE, AUSTRALIAN GOV'T, SOUTHERN RIGHT WHALE RECOVERY PLAN 2005–2010, at 6 (2005) [hereinafter SOUTHERN RIGHT WHALE RECOVERY PLAN].

<sup>77</sup> See BLUE, FIN AND SEI WHALE RECOVERY PLAN, *supra* note 76, at 8; HUMPBACK WHALE RECOVERY PLAN, *supra* note 76, at 8; SOUTHERN RIGHT WHALE RECOVERY PLAN, *supra* note 76, at 8.

<sup>78</sup> See BLUE, FIN AND SEI WHALE RECOVERY PLAN, *supra* note 76, at 6–8; HUMPBACK WHALE RECOVERY PLAN, *supra* note 76, at 6–8; SOUTHERN RIGHT WHALE RECOVERY PLAN, *supra* note 76, at 6–8.

<sup>79</sup> EPBC Act § 475 (1999) (Austl.).

<sup>80</sup> *Id.* § 475(1).

<sup>81</sup> *Id.* § 475(6).

individual, except that an organization that has engaged in environmental conservation or protection activities within two years prior to the conduct must also have these activities as its object or purpose.<sup>82</sup> These provisions have been broadly construed by Australian courts.<sup>83</sup>

## II. USING AUSTRALIAN COURTS: THE CASE OF JAPANESE WHALING

Australia and Japan, in particular, have been at loggerheads over the whaling issue since Australia adopted its staunch anti-whaling position. For nearly twenty years, Australia has challenged Japan's scientific whaling program in the Antarctic Southern Ocean.<sup>84</sup> As played out in government press releases and the media in Australia, the dispute has harsh overtones of nationalism and a desire to "win" against Japan in some sort of international "competition."<sup>85</sup> The same media posture seems to prevail in Japan, too.<sup>86</sup>

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<sup>82</sup> *Id.* § 475(7).

<sup>83</sup> *See, e.g.,* Booth v. Bosworth (2001) 114 F.C.R. 39 (Austl.). *See generally* ANDREW MCINTOSH & LYNDALE KENNEDY, EPBC ACT: A USERS GUIDE 25 (3d ed. 2004) (discussing judicial review of administrative decisions under the EPBC Act), available at [http://www.wwf.org.au/publications/epbc\\_bigguide/](http://www.wwf.org.au/publications/epbc_bigguide/).

<sup>84</sup> A UNIVERSAL METAPHOR, *supra* note 39, at 62. "Australia has consistently questioned the basis of the Japanese scientific whaling program and urged the Japanese Government to withhold permits for the annual slaughter of several hundred minke whales." HAWKE, *supra* note 40, at 25.

<sup>85</sup> Australian media coverage has often taken the lead from stilted ministerial press releases. *See, e.g.,* Australian Antarctic Division, New Australian Research Shows Japan's Scientific Whaling is a Sham, <http://www.aad.gov.au/default.asp?casid=21638> (last visited Feb. 19, 2009) (discussing Press Release, Ian Campbell, Australian Minister for the Environment, New Australian Research Shows Japan's Scientific Whaling is a Sham (Mar. 28, 2006)). Illustrative media reports include: Geoff Elliott, *Japanese Accused as Whale Ban Stays*, AUSTRALIAN, June 19, 2006, Local, at 3; Selina Mitchell, *Japan's Humpback Hunt Plan a "Disgrace"*, AUSTRALIAN, June 15, 2006, Local, at 2; Greg Roberts, *Most Japanese Whale Kills in Aussie Haven*, AUSTRALIAN, Aug. 7, 2006, Local, at 4; *see also* Ian McArthur, *Media Portrayal of the Cultural Relationship Between Australia and Japan*, 60 AUSTRALIAN J. INT'L AFF. 574, 585 (2006) ("Australian reports . . . have focused on emotional demands that Japanese vessels leave 'our' ocean."). The Australian mass media reports these sorts of international stories as if they were sporting events—Australia vs. Japan. *See generally* GRAEME TURNER, MAKING IT NATIONAL: NATIONALISM AND AUSTRALIAN POPULAR CULTURE (1994) (discussing the role of the mass media in shaping Australian nationalism).

<sup>86</sup> *See, e.g.,* Shigeko Misaki, *Whaling Controversy Is the Name of the Game*, in INST. OF CETACEAN RESEARCH, PUBLIC PERCEPTION OF WHALING 21, 38 (1994) (stating that anti-whaling states practice "ethnocentric arrogance" and "cultural imperialism"); Alan Macnow, Letter to the Editor, *Misinformed Arguments for a Total Whaling Moratorium*, N.Y. TIMES, Feb. 9, 1984, at A30; Norimitsu Onishi, *Whaling: A Japanese Obsession with American Roots*, N.Y. TIMES, Mar. 14, 2007, at A4; *see also* Sandra Buckley, *Whale Meat and Whaling*, in ENCYCLOPEDIA OF CONTEMPORARY JAPANESE CULTURE 564–65 (Sandra Buckley ed., 2006); Arne Kalland, *Japanese Perceptions of Whales and Dolphins*, in WILDLIFE IN ASIA: CULTURAL PER-

On January 15, 2008, the Federal Court of Australia issued declaratory relief and an injunction against Kyodo Senpaku Kaisha Ltd. (Kyodo), a Japanese whaling company operating in the Southern Ocean. Kyodo operated in the Australian Whale Sanctuary (AWS), within the claimed EEZ off the Australian Antarctic Territory (AAT).<sup>87</sup> The court declared that Kyodo had breached sections 229–232 and 238 of the EPBC Act by killing, treating, and possessing whales in the AWS in the EEZ adjacent to the Australian Antarctic Territory.<sup>88</sup> It also enjoined Kyodo from the further killing, injuring, taking, or interfering with any Antarctic minke whale, fin whale, or humpback whale in the AWS adjacent to the AAT.<sup>89</sup>

#### A. *Application for Leave to Serve Process in Japan*

The case was brought in 2004 by Humane Society International (HSI), a non-governmental organization, which sued Kyodo for alleged illegal whaling under Australian federal law, seeking the declaration and injunction ultimately granted.<sup>90</sup> As discussed above, the law giving rise to the action is found in the EPBC Act, including legal standing for HSI.<sup>91</sup> The AWS is established under section 225 of the EPBC Act. By virtue of sections 5(1), 5(4), and 5(5) of the EPBC Act, section 8 of the Australian Antarctic Territory Act 1954, section 10 of

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SPECTIVES 73–85 (John Knight ed., 2004); Keiko Hirata, *Why Japan Supports Whaling*, 8 J. INT'L WILDLIFE L. & POL'Y 129, 141–49 (2005).

<sup>87</sup> Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd. (2008) 165 F.C.R. 510, 525 (Austl.).

<sup>88</sup> *Id.* at 525–26. The description of this case is drawn from an earlier article: Donald K. Anton, *False Sanctuary: The Australian Antarctic Whale Sanctuary and Long-Term Stability in Antarctica*, 8 SUSTAINABLE DEV. L. & POL'Y 17 (2008).

<sup>89</sup> *Humane Soc'y Int'l Inc.*, 165 F.C.R. at 525–26. Orders were granted for substituted service of the declaratory and injunctive relief on January 18, 2008. Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd., 2008 WL 225056, ¶ 1 (Fed. Ct. Austl. Jan. 18, 2008). Personal service and service by mail were effected in January 2008. E-mail from Chris McGrath, Barrister for the plaintiff, to the author (Feb. 4, 2008) (on file with author).

<sup>90</sup> It was alleged that Kyodo had illegally taken approximately 428 whales between 2001 and 2004 and evidence was presented that whaling would continue under an ongoing Japanese whale research program known as JARPA. Statement of Claim ¶¶ 6–7, Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd., (2004) 212 A.L.R. 551 (Austl.). The claim was amended in 2005 after the release of JARPA II. Amended Statement of Claim ¶ 14, Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd. (2006) 154 F.C.R. 425 (Austl.).

<sup>91</sup> EPBC Act, 1999, § 475(7) (Austl.). Under section 475(7) of the EPBC Act, HSI was determined to be an “interested person” for the purpose of standing, presumably because during the two years prior to the acts complained of, HSI had engaged in activities related to the protection of whales in furtherance of its objects or purposes. Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd., (2004) 212 A.L.R. 551, ¶ 15; *see* EPBC Act, 1999, § 475(7)(b) (Austl.).



the Seas and Submerged Lands Act 1973 and the 1994 Proclamation of the EEZ adjacent to the Australian Antarctic Territory, the Australian Whale Sanctuary applies to the declared AAT EEZ.<sup>92</sup> As discussed, Sections 229 through 230 of the EPBC Act make it an offense to kill, injure, take, interfere with, treat, or possess whales without an Australian permit, within the AWS.<sup>93</sup> The offense provisions expressly apply to both Australian nationals and nationals or residents within the AWS, but only to non-nationals beyond the outer limits of the AWS.<sup>94</sup>

One of the elements that the applicant had to satisfy in order to be granted leave to serve originating process in Japan was that the violation complained of took place “in the Commonwealth.”<sup>95</sup> Such an investigation, because dictated by Australian law, allowed the court a rare, but missed, opportunity to consider the international legality of the exercise of Australian adjudicative and enforcement jurisdiction in relation to the AAT EEZ. Initially, Justice Allsop was prepared to treat as conclusive the determination of the boundaries of the Commonwealth by the Executive Branch of government, including the EEZ.<sup>96</sup>

Before denying the initial application for leave to serve process, Justice Allsop took the extraordinary step of inviting the *amicus curiae* intervention of the Attorney-General to provide the government’s views on the application of “legislation and treaties involved . . . in the light of what might be seen to be Australia’s national interest, including . . . relations between Australia and Japan.”<sup>97</sup> The Attorney-General stated that “an assertion of jurisdiction by an Australian court over claims concerning rights and obligations found in the [EEZ of the AAT] . . . would or may provoke an international disagreement with Japan, undermine the status quo attending the Antarctic Treaty, and ‘be contrary to Australia’s long term national interests.’”<sup>98</sup> According to Justice Allsop, this view was based on the recognition of three realities by the gov-

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<sup>92</sup> Proclamation Under Seas and Submerged Lands Act 1973 (Jul. 29, 1994) (Austl.), as reprinted in F.R.L.I. F2008B00721, available at [http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/A5328250782C80CFCA2574F10082ED57/\\$file/ProclamationundertheSeasandSubmergedLandsAct19731994.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/A5328250782C80CFCA2574F10082ED57/$file/ProclamationundertheSeasandSubmergedLandsAct19731994.pdf).

<sup>93</sup> Under section 7 of the EPBC Act, Chapter 2 of the Criminal Code (Austl.), with the exception of Part 2.5, applies to all offences against the Act. EPBC Act, 1999, § 7 (Austl.).

<sup>94</sup> *Id.* §§ 5(3), 224(2).

<sup>95</sup> FED. CT. R. 8.2(1) (Austl.).

<sup>96</sup> *Humane Soc’y Int’l Inc.*, 212 A.L.R. 551, ¶¶ 19–22 (citing *Petrotimor Companhia de Petroleos Sarl v. Australia* (2003) 126 F.C.R. 354, 361–62).

<sup>97</sup> *Id.* ¶ 3.

<sup>98</sup> *Humane Soc’y Int’l Inc. v. Kyodo Senpaku Kaisha Ltd.*, 2005 WL 1244815, ¶ 14 (Fed. Ct. Austl. 2005).

ernment. First, Japan would regard enforcement of the EPBC Act against Japanese vessels and its nationals in the AAT EEZ as a breach of international law.<sup>99</sup> Second, the exercise of enforcement jurisdiction against foreigners generally in the AAT EEZ, based on the Australian territorial claim, would “prompt a significant adverse reaction from other Antarctic Treaty Parties.”<sup>100</sup> Third, the Australian government has not enforced the Australian law in Antarctica against the nationals of other state parties, except where there has been voluntary submission to Australian law.<sup>101</sup>

In accepting that exercising jurisdiction might upset diplomatic concord under the Antarctic Treaty and be contrary to Australian national interest, Justice Allsop also stated that any injunctive relief granted would ultimately be futile because of “the difficulty, if not impossibility, of enforcement of any court order”<sup>102</sup> and could place the Federal Court “at the centre of an international dispute . . . between Australia and a friendly foreign power . . . .”<sup>103</sup> As a result, Allsop ruled that he “should not exercise a discretion to place the Court in such a position” and denied the application for leave to serve process in Japan.<sup>104</sup>

Significantly, following the intervention of the Attorney-General, Allsop appeared prepared to return to consider the merits of the validity of the Australian claim to jurisdiction in the AAT EEZ as a predicate to granting or denying leave to serve process related to an event occurring “in the Commonwealth.”<sup>105</sup> Allsop raised the issue of whether all “the area” of the Southern Ocean south of sixty degrees south latitude, in which the AAT EEZ is claimed, is high seas (in which an EEZ may not exist) because Article VI of the Antarctic Treaty protects “the rights . . . of any State under international law with regard to the high seas

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<sup>99</sup> *Id.* ¶ 13. Violation would arise presumably because either Australia does not have good title to Antarctic territory from which to project an EEZ or, alternatively, the extension of Australia’s Antarctic claim to the EEZ is prohibited by Article IV of the Antarctic Treaty. See Antarctic Treaty art. IV, *opened for signature* Dec. 1, 1959, 12 U.S.T. 796, 402 U.N.T.S. 74 (*entered into force* June 23, 1961) [hereinafter Antarctic Treaty].

<sup>100</sup> *Humane Soc’y Int’l Inc.*, 2005 WL 1244815, ¶ 13.

<sup>101</sup> *Id.* Outline of Submissions of the Attorney-General of the Commonwealth of Australia as Amicus Curiae, *Humane Soc’y Int’l Inc. v. Kyodo Senpaku Kaisha Ltd.*, 2005 WL 1244815, ¶ 14 (Fed. Ct. Austl. 2005).

<sup>102</sup> *Humane Soc’y Int’l Inc.*, 2005 WL 1244815, ¶ 28.

<sup>103</sup> *Id.* ¶ 35.

<sup>104</sup> *Id.* ¶¶ 36–37.

<sup>105</sup> *Id.* ¶¶ 2–4.

within that area.”<sup>106</sup> In fact, however, it seems that Allsop was really interested in how Article IV of the Antarctic Treaty and its prohibition on making any “new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica” might bear on the proclamation of Australia to an Antarctic EEZ in 1994.<sup>107</sup>

In particular, Allsop noted the submission by the Attorney-General that there is a distinction between the “enlargement of an existing claim to territorial sovereignty” and the claim of Australia to an Antarctic EEZ:

[I]t was submitted on behalf of the Attorney-General, [that] the claim of Australia to the Antarctic EEZ is not one of sovereignty in the full sense over the waters adjacent to the Antarctic Territory (except for the territorial sea), but of claims . . . to exercise the rights of exploitation, conservation, management and control, and enforcement thereof, given to coastal States by UNCLOS. . . . The recognition of the limitations (short of full claims to sovereignty) of Australia’s claims to the Antarctic EEZ becomes important in assessing whether . . . the acts of the respondent and the contraventions of the EPBC Act took place “in the Commonwealth.”<sup>108</sup>

In the end, however, Allsop did not decide on the operative effect of Article IV of the Treaty in relation to the declared AAT EEZ.<sup>109</sup> Instead, he used the submission by the Attorney-General to contrast the contrary position of Japan (and most of the rest of the world). Allsop noted that “[a]s far as Japan is concerned, the Australian Antarctic EEZ is the high seas which is not subject to any legitimate control by Australia under UNCLOS and domestic legislation provided for thereby (such as the EPBC Act).”<sup>110</sup> The conflicting positions thus contrasted, Allsop accepted the Attorney-General’s position that international discord would follow by granting leave to serve process, and it became “unnecessary to decide whether the Antarctic EEZ is, or can be seen as, ‘in the Commonwealth’ . . . .”<sup>111</sup>

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<sup>106</sup> See *id.* ¶ 7 (quoting Antarctic Treaty, *supra* note 99, art. VI); see *infra* notes 136–140 and accompanying text.

<sup>107</sup> Antarctic Treaty, *supra* note 99, art. IV(2).

<sup>108</sup> *Humane Soc’y Int’l Inc.*, 2005 WL 1244815, ¶ 12.

<sup>109</sup> See *id.* ¶ 42.

<sup>110</sup> *Id.* ¶ 12.

<sup>111</sup> *Id.* ¶ 42. Allsop did, however, indicate that the submission of the Attorney-General had great force. *Id.*

Significantly, Allsop noted cultural differences with respect to whaling and hinted that the current stigma attached to whaling might signal a move away from conservation and sustainable utilization to a wish by some to preserve charismatic mega-fauna at all costs.<sup>112</sup> Allsop explained:

The whales being killed . . . are seen by some as not merely a natural resource that is important to conserve, but as living creatures of intelligence and of great importance not only for the animal world, but for humankind and that to slaughter them . . . is deeply wrong. These views are not shared by all. . . . They are views which, at an international level, are mediated through the Whaling Commission and its procedures, by reference to the Whaling Convention and the views of nation States. They are views which contain a number of normative and judgmental premisses . . . which do not arise in any simple application of domestic law, but which do, or may, arise in a wider international context.<sup>113</sup>

### B. *The Appeal*

On appeal, a Full Bench of the Federal Court reversed Justice Allsop.<sup>114</sup> Taking a more dualistic, traditional Australian approach to the underlying legal and international relations issues, none of the appellate judges gave any weight to the international political considerations raised by the Attorney-General.<sup>115</sup> Even the dissent was in agreement on this point, stating that “[c]ourts must be prepared to hear and determine matters whatever their political sensitivity either domestically or internationally. To approach the matter otherwise, is to compromise the role of the courts as the forum in which rights can be vindicated whatever the subject matter of the proceedings.”<sup>116</sup> The majority held that the action was made clearly justiciable by the Aus-

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<sup>112</sup> *Id.* ¶ 29. Even those opposed to lifting the moratorium on whaling recognize that objections based on threatened, depleted stocks have “a limited duration, as the reintroduction of commercial whaling under the [Revised Management Plan] can be *scientifically justified*. In time, the IWC can be expected to authorize commercial whaling of Minke whales.” Alexandre Gillespie, *The Ethical Question in the Whaling Dispute*, 9 GEO. INT’L ENVTL. L. REV. 355, 359 (1997).

<sup>113</sup> *Humane Soc’y Int’l Inc.*, 2005 WL 1244815, ¶ 29.

<sup>114</sup> *Humane Soc’y Int’l Inc. v. Kyodo Senpaku Kaisha Ltd.*, (2006) 154 F.C.R. 425, 428.

<sup>115</sup> *See id.* at 430.

<sup>116</sup> *Id.* at 435.

tralian Parliament under the EPBC Act and related authority.<sup>117</sup> The court had clear jurisdiction. The applicant had clear standing. Accordingly, jurisdiction could be assumed by service or submission and questions of futility would arise, if at all, at the time of the issuance of injunctive or declaratory relief.<sup>118</sup>

### C. *The Trial*

On remand, the matter was heard in September 2007 and Kyodo, as expected, did not appear. Instead of relying on a default, HSI proceeded to prove the facts supporting its claim for declarative and injunctive relief. Following the guidance provided by the majority of the Full Federal Court on appeal regarding public interest injunctions, Allsop granted the declaration and injunction sought by HSI.<sup>119</sup> This, of course, raises the prospect of contempt proceedings in Australian courts because Kyodo failed to comply with the injunction in the 2007–08 whaling season.<sup>120</sup> It also raises the question of whether the federal government is prepared to enforce the injunction in the event of violation by intercepting and seizing Kyodo ships operating in the AAT EEZ. Indeed, it has the potential to bring the unilateral exercise of Australia's prescriptive, adjudicative, and enforcement jurisdiction to bear on ships and individuals in an area that almost all other states view as the high seas and, if they are correct, are thus subject to the exclusive jurisdiction of the flag state.<sup>121</sup> Expanding jurisdiction this dramatically is clearly inconsistent with uniform past Australian practice not to enforce Australian laws against non-nationals in Antarctica.<sup>122</sup>

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<sup>117</sup> See *id.* at 431.

<sup>118</sup> *Id.*

<sup>119</sup> *Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd.*, (2008) 165 F.C.R. 510, 525–26 (Fed. Ct. Austl.).

<sup>120</sup> See Federal Court Act, 1976, § 31 (Austl.); FED. CT. R. 40 (Austl.). The injunction itself cannot be enforced in Japan because Japan does not recognize Australian jurisdiction over the matter, it is a non-monetary order, and is against public policy under Japanese law. See generally Leif Gamertsfelder, *Cross Border Litigation: Exploring the Difficulties Associated with Enforcing Australian Money Judgments in Japan*, 17 AUSTRAL. B. REV. 161 (1998); Kenneth D. Helm, Comment, *Enforcing Foreign Civil Judgments in Japan*, 1 WILLAMETTE BULL. INT'L L. & POL'Y 71 (1993).

<sup>121</sup> See United Nations Convention on the Law of the Sea art. 92(1), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>122</sup> See Outline of Submissions of the Attorney-General of the Commonwealth of Australia as Amicus Curiae ¶ 16, *Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd.*, [2005] FCA 664, 2005 WL 1244815, ¶ 14 (Fed. Ct. Austl. 2005). As mentioned above, it is also inconsistent with the approach by Australian fisheries laws, which apply only to Australian nationals, Australian vessels, and to crewmembers of those vessels in Antarctica. See Antarctic Marine Living Resources Conservation Act, 1981 § 5(2) (Austl.). The Act applies

Yet, in the late 2007 national election campaign, the recently elected Labor government pledged to “[e]nforce Australian law banning the slaughter of whales in the Australian Whale Sanctuary.”<sup>123</sup> Additionally, the new Australian Government Solicitor wrote to Justice Allsop in December 2007 during the trial of the HSI case on instructions from the new Attorney-General. The letter stated that the court should not rely on the views of the Attorney-General of the previous government. Instead, the letter highlighted that the new “Government believes that the matter would best be considered by the Court without the Government expressing its view.”<sup>124</sup>

During the 2007–08 Southern Hemisphere summer whaling season, the Australian government dispatched the Oceanic Viking to monitor whaling in the Southern Ocean, but it neither intercepted nor seized any Japanese whaler operating in the AAT EEZ.<sup>125</sup> The government claimed that the Oceanic Viking was being used to collect evidence that might be used in international litigation challenging the lawfulness of Japanese whaling for “scientific purposes” under the ICRW.<sup>126</sup> But, given the current government’s position, one is still left to wonder if it is only a matter of time before the Australian government will act against Japanese ships and Japanese nationals in the AAT EEZ.

### III. THE LIMITS OF AUSTRALIAN DOMESTIC LITIGATION

Because the Kyodo case arises under the claim by Australia to an EEZ in Antarctica, it is important to consider the underlying legal foundation of the claim and the implications it has for the ATS.<sup>127</sup> Legally, only coastal states can assert claims to an EEZ because its delimitation is dependent upon the presence of a coast.<sup>128</sup> This means that the starting point for analysis of any maritime claim is the valid

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to nonnationals within what is defined as the “Australian Fishing Zone” (AFZ), but since there is no AFZ appurtenant to the AAT, the Act only applies to nationals. *See id.*; *see also* Fisheries Management Act, 1991 § 4 (Austl.); Proclamation No. S52, *supra* note 63.

<sup>123</sup> *See* A UNIVERSAL METAPHOR, *supra* note 39.

<sup>124</sup> Letter from Tony Burslem, Senior Executive Lawyer, Australian Government Solicitor, to Ngairé Ballment, Associate to Justice Allsop (Dec. 12, 2007) (on file with author).

<sup>125</sup> *See* Press Release, Stephen Smith, Minister for Foreign Affairs, and Peter Garrett, Minister for the Environment, Heritage and the Arts, and Bob Debus, Minister for Home Affairs, Action on Japanese “Scientific Whaling” (Jan. 7, 2008), <http://www.australia.or.jp/english/scifu/pressreleases/?pid=TK01/2008>.

<sup>126</sup> *Id.*; *see supra* note 36 and accompanying text.

<sup>127</sup> The analysis here build on Donald K. Anton, *Australian Jurisdiction and Whales in Antarctica*, 11 ASIA PAC. J. ENVTL. L. 159, 171–80 (2008).

<sup>128</sup> UNCLOS, *supra* note 121, at arts. 5-15, 55-57. UNCLOS recognizes the rights of landlocked states in the EEZ. *Id.*, at art. 69.

title of a state to the territory from which the maritime claim is advanced. The Australian Antarctic territorial claim, from which its maritime claim to an EEZ in Antarctica derives, is based on an Order in Council dated February 7, 1933, by which the British Government asserted what it called “*sovereign rights*”—as opposed to sovereignty—over “that part of the territory in the Antarctic Seas which comprises all the islands and territories other than Adélie Land situated south of the 60th degree of South Latitude and lying between the 160th degree of East Longitude and the 45th degree of East Longitude . . . .”<sup>129</sup> The Order also placed the administration of the territory under the authority of the Commonwealth of Australia.<sup>130</sup> Of course, Australia could receive no more than what was validly claimed and placed under Australian administration by the British Government under the principle of *nemo dat quod non habet*.<sup>131</sup>

#### A. Article IV and the Declaration of an Antarctic EEZ

Without exaggeration, it can be said that the entire edifice of international law in Antarctica is built on Article IV of the Antarctic Treaty.<sup>132</sup> It has allowed claimants, potential claimants, and non-claimants, all with radically different interests in Antarctica and different views about its legal status, to cooperate peacefully for scientific purposes for nearly fifty years. Textually, Article IV(2) has direct bearing on the legality of Australia’s declaration of an Antarctic EEZ in 1994 and enforcement of the Australian AWS under the EPBC Act. Specifically, the treaty prohibits a state from asserting a “new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica . . . .”<sup>133</sup> The effect “would seem to be that EEZs cannot be claimed off [Antarctic] territory . . . .”<sup>134</sup>

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<sup>129</sup> Australian Antarctic Territory Order in Council, 1933 (U.K.), as reprinted in LONDON GAZETTE, Feb. 14, 1933, No. 33911, at 1011 (emphasis added).

<sup>130</sup> *Id.* The Australian Antarctic Territory Acceptance Act 1933 was promulgated under Section 122 of the Australian Constitution in order to accept the territory placed under Australian administration by the 1933 British Order in Council. The territory accepted was denominated as the Australian Antarctic Territory (AAT). Australian Antarctic Territory Acceptance Act, 1933, § 2 (Austl.).

<sup>131</sup> See R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 16–17 (1963).

<sup>132</sup> Rolph Trolle-Anderson, *The Antarctic Scene: Legal and Political Facts*, in *THE ANTARCTIC TREATY REGIME: LAW, ENVIRONMENT AND RESOURCES* 57, 59–60 (Gillian D. Triggs ed., 1987).

<sup>133</sup> Antarctic Treaty, *supra* note 99, at art. IV(2).

<sup>134</sup> R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 165 (3d ed. 1999).

What then are the implications of this prohibition and how, if at all, does it apply to the Australian Antarctic EEZ and the assertion of jurisdiction against Kyodo? If, in fact, the effect is to prohibit the declaration of an EEZ in Antarctica, then the entire Kyodo case fails, at least at international law, for want of an internationally recognized basis of jurisdiction. The nub of the matter though is what constitutes a "claim" and what constitutes "territorial sovereignty" under Article IV(2).

### 1. "Claims" to Maritime Zones

It has been argued that claims to maritime zones in the Antarctic are not "claims" in the sense that term is employed in Article IV.<sup>135</sup> Maritime zones are said to exist *ipso facto* as juridical features of the coastal state provided by international law.<sup>136</sup> The EEZ, being a maritime zone, so the argument goes, thus is not a "claim" or "enlargement of an existing claim" and so does not fall afoul of Article IV. The problem, though, is not as straightforward as this, especially as it concerns the EEZ.

The EEZ, unlike ancient customary maritime zones, is a modern creation of international law.<sup>137</sup> It only slowly emerged during the negotiation of the United Nations Convention on the Law of the Sea (UNCLOS) adopted in 1982 and, even then, required a period of gestation before confident claims of custom were advanced and accepted.<sup>138</sup> The EEZ, unlike ancient customary maritime zones, is exceptionally large. It dramatically extends exclusivity with respect to natural resources up to 200 nautical miles from coastal baselines. In recognition of the dramatic enclosing aspects of the new maritime zone (not to mention the transfer of wealth in the form of resources), the parties to

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<sup>135</sup> STUART KAYE, *AUSTRALIA'S MARITIME BOUNDARIES* 200 (2d ed. 2001); Stuart Kaye & Donald R. Rothwell, *Australia's Antarctic Maritime Claims and Boundaries*, 26 OCEAN DEV. & INT'L L. 195, 201 (1995).

<sup>136</sup> Philippe Gautier, *The Maritime Area of the Antarctic and the New Law of the Sea*, in *THE ANTARCTIC ENVIRONMENT AND INTERNATIONAL LAW* 121, 126 (Joe Verhoeven et al. eds., 1992); Gillian D. Triggs, *The Antarctic Treaty System: Some Jurisdictional Problems*, in *THE ANTARCTIC TREATY REGIME*, *supra* note 132, at 88, 90–91. A more compelling case in relation to the territorial sea, assuming a coastal state, is made in Brian R. Opeskin & Donald R. Rothwell, *Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles*, 22 OCEAN DEV. & INT'L L. 395, 401–03 (1991).

<sup>137</sup> CHURCHILL & LOWE, *supra* note 134, at 160.

<sup>138</sup> The EEZ is claimable today under both UNCLOS and at customary international law. *See* *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 32–33 (June 3).



UNCLOS merely established the maximum limit of the EEZ.<sup>139</sup> This requires that states seeking to establish an EEZ first have to put the world on notice with a declaration of the EEZ claimed.<sup>140</sup>

In these circumstances, it is difficult to characterize the declaration of an EEZ, in Antarctica or elsewhere, as anything but a claim. The EEZ did not exist in 1961 when the Antarctic Treaty came into force. Upon its establishment, it did not automatically attach to a coastal state by virtue of international law, as may be the case in connection with the territorial sea<sup>141</sup> or the contiguous zone.<sup>142</sup> An EEZ is not created *ipso facto*, but must be declared. Accordingly, under Article IV(2) of the Antarctic Treaty it seems clear that the declaration of an EEZ is a “claim” that is prohibited, provided the other conditions of the Article are satisfied.

## 2. New Claim or Enlargement of Claim

It needs to be remembered that Article IV(2) prohibits new claims or the enlargement of existing claims. This raises the question of how a declaration purporting to establish an Antarctic EEZ should be treated under Article IV(2). Is it a new claim or is it an enlargement of an existing claim? The answer depends on the position adopted as to whether maritime zones, outside the high seas, exist in the Antarctic Southern Ocean.<sup>143</sup> If there are only high seas, then the claim would be seen as new. If, however, the historic territorial sea and contiguous zone were seen as existing prior to entry into force of the Antarctic Treaty, then the claim to an EEZ more resembles enlargement. Under either approach, however, it is clear that a claim exists that is prohibited by Article IV.

The prohibitions on new or enlarged claims under Article IV both have particular salience for Australia’s AAT EEZ. As noted, the concept of the EEZ did not exist in 1961 when the Antarctic Treaty

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<sup>139</sup> UNCLOS, *supra* note 121, at art. 57; DAVID JOSEPH ATTARD, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW 212 (1986); Julia Green, *Antarctic EEZ Baselines: An Alternative Formula*, 11 INT’L J. MARINE & COASTAL L. 333, 335 (1996).

<sup>140</sup> For a comprehensive compilation of coastal state claims to an EEZ by declaration, see Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs of the United Nations, Table of Claims to Maritime Jurisdiction, May 28, 2008, [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table\\_summary\\_of\\_claims.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf) (updating The Secretary-General, *Report of the Secretary-General on Oceans and the Law of the Sea*, annex II, delivered to the General Assembly, U.N. Doc. A/56/58 (Mar. 9, 2001)).

<sup>141</sup> See UNCLOS, *supra* note 121, at art. 2.

<sup>142</sup> See *id.* at art. 33.

<sup>143</sup> See discussion *infra* part IV.B.

came into force. In terms of maritime zones, the most a claimant state could have legitimately asserted in 1961 was a three to twelve mile territorial sea and a maximum additional twelve mile contiguous zone.<sup>144</sup> With the entry into force of Article IV of the Antarctic Treaty, a legal bar to EEZ claims was established because such a claim would either be a new claim or the enlargement of an existing claim.<sup>145</sup>

It has been argued that the concept of intertemporal law should allow claimant states to take into account developments in the law of maritime zones.<sup>146</sup> As a consequence, even though no EEZ existed in 1961, the international law of today permits the declaration of an EEZ, which is said to permit claimant states to Antarctic EEZs.<sup>147</sup> This ignores, of course, the fact that an EEZ is not a juridical consequence of possessing a coast that automatically arises, but must be claimed in the sense of a claim prohibited by Article IV as discussed above. It also ignores the application of the principle of the critical date—intertemporal law's counterpart.<sup>148</sup>

Admittedly, the law must move with the times. However, the essential bargain struck in the Antarctic Treaty was a commitment that nothing done subsequently would prejudice existing claims (or potential claims), in exchange for a commitment that no new or enlarged claims would be made (and that nothing done subsequently could better existing or potential claims). To allow the intertemporal law to undermine the essence of the treaty—by attributing an EEZ to all claimant states by operation of law—would defeat the stability and security created by the Treaty, which are its fundamental objects and purposes.

Instead, in gauging whether EEZ claims are permissible under the Antarctic Treaty, it is first necessary to establish the critical date—the date upon which the legal position depends.<sup>149</sup> Developments with respect to claims subsequent to the critical date are ignored and

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<sup>144</sup> See KENNETH BAILEY, *AUSTRALIA AND THE LAW OF THE SEA* 21–29 (1959); MYRES S. McDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* chs. 5 & 6 (1962).

<sup>145</sup> Donald R. Rothwell & Christopher C. Joyner, *Domestic Perspectives and Regulations in Protecting the Polar Marine Environment: Australia, Canada and the United States*, in *PROTECTING THE POLAR MARINE ENVIRONMENT: LAW AND POLICY FOR POLLUTION PREVENTION* 149, 164 (Davor Vidas ed., 2000).

<sup>146</sup> Francisco Orrego Vicuña, *The Law of the Sea and the Antarctic Treaty System: New Approaches to Offshore Jurisdiction*, in *THE ANTARCTIC LEGAL REGIME* 97, 99–100 (Christopher C. Joyner & Sudhir K. Chopra eds., 1988).

<sup>147</sup> *Id.*

<sup>148</sup> See generally D.W. GREIG, *INTERTEMPORALITY AND THE LAW OF TREATIES* (2001).

<sup>149</sup> L.F.E. Goldie, *The Critical Date*, 12 *Int'l & Comp L.Q.* 1251, 1251 (1963).

denied legal effect.<sup>150</sup> Upon entry into force on June 23, 1961, Article IV of the Antarctic Treaty fixed the date after which the legal situation with respect to the permissibility of claims could not be altered.<sup>151</sup> Accordingly, the subsequent development of the concept of the EEZ can have no application.

### 3. Territorial Sovereignty in Antarctica Versus Sovereign Rights

The language of Article IV(2) of the Antarctic Treaty precludes new or enlarged claims "to territorial sovereignty in Antarctica." The focus here is on the phrase "territorial sovereignty." Because territorial sovereignty does not exist within the EEZ, but instead "sovereign rights" pertain,<sup>152</sup> and because the Antarctic Treaty is only concerned with claims in Antarctica, it has been argued that Article IV(2) does not limit a claim to an EEZ.<sup>153</sup> The claim to sovereign rights in an EEZ, in other words, does not involve "territorial sovereignty in Antarctica." If this is accurate, then despite being a "claim" in the Article IV(2) sense, a claim to an EEZ would not violate the Article.

In examining the distinction between sovereignty and sovereign rights, one is hard pressed to find a legal definition that clearly separates the two. It is true that Article 56(1) of UNCLOS elaborates specific purposes for which exclusive "sovereign rights" in the EEZ may be exercised. Likewise, Article 2 of the UNCLOS provides that the "sovereignty" of a coastal state extends to the limits of the territorial sea. UNCLOS does not provide a definition for either term.<sup>154</sup> It does, however, confirm strong similarities in connection with the power, and limitations on that power, both entail. Importantly, it establishes that neither sovereignty nor sovereign rights are absolute.<sup>155</sup> In the territorial sea,

<sup>150</sup> YEHUDA Z. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 208–09 (1965).

<sup>151</sup> *Id.* at 209; see Gillian Doreen Triggs, *Australia's Sovereignty in Antarctica: The Validity of Australia's Claim at International Law* 256 (Melbourne Univ. Programme in Antarctic Studies, Publ'n No. 61, 1983) (on file with author).

<sup>152</sup> UNCLOS, *supra* note 121, at art. 56(1) (a).

<sup>153</sup> Arthur D. Watts, *The Antarctic Treaty as a Conflict Resolution Mechanism*, in POLAR RESEARCH BOARD, NATIONAL RESEARCH COUNCIL, *ANTARCTIC TREATY SYSTEM: AN ASSESSMENT* 65, 69 (1986).

<sup>154</sup> Those authors that do make distinctions must do so based on instances of different treatment in the Convention text. See, e.g., James L. Zackrison & James E. Meason, *Chile, Mar Presencial, and Law of the Sea*, NAVAL WAR C. REV., Summer 1997, at 65, 76.

<sup>155</sup> More generally, as John Jackson writes, "[a] multitude of treaties and customary international law norms impose international legal constraints" on what is presumably the more expansive notion of sovereignty. John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, in *POLITICS, VALUES*

the obvious example where sovereignty must give way is the right of foreign flag vessels to exercise the right of innocent passage.<sup>156</sup> In the EEZ, other states continue to enjoy the freedom of navigation, overflight, and the laying of submarine cables, despite the coastal state's exclusive sovereign rights over all natural resources.<sup>157</sup>

Perhaps more important are the similar aspects, in terms of power, thought to be entailed in the concepts of sovereignty and sovereign rights, especially as those rights are applied in the EEZ. Fundamentally, both encompass the power entailed in the principle of permanent sovereignty over natural resources. Both entail, in other words, the exclusive control over, and access to, all the natural resources within their respective ambits, subject to the limits of international law.<sup>158</sup> The political and economic consequences of such power are readily apparent, both for individual states able to declare an EEZ and for the broader international community. The enclosure of the oceans by virtue of the EEZ has given individual states exclusive control over approximately thirty-six percent of the total area of the sea.<sup>159</sup> This area "contains over ninety per cent of all presently commercially exploitable fish stocks [and] about eighty-seven per cent of the world's known submarine oil deposits . . . ."<sup>160</sup>

Likeness in terms of power, rather than difference, is no doubt one reason why states are only accorded "sovereign rights" over natural resources found in their territory under the Convention on Biological Diversity.<sup>161</sup> Likeness in terms of power, rather than difference, is also no doubt one reason that the British claim to territory in the Antarctic, to which Australia succeeded, is couched in terms of "sovereign rights," not "sovereignty."<sup>162</sup> For these reasons it is logical and appropriate that Article IV(2) applies with similar force to limit the extension of EEZ maritime claims.

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AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY 149, 151 (Jonathan I. Charney, Donald K. Anton & Mary Ellen O'Connell eds., 1997).

<sup>156</sup> UNCLOS, *supra* note 121, at arts. 17–32.

<sup>157</sup> *Id.* at art. 58(1).

<sup>158</sup> This includes UNCLOS, *supra* note 121, art. 62(2). See generally FRANZ XAVER PERREZ, COOPERATIVE SOVEREIGNTY: FROM INDEPENDENCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW, ch. 2 (2000) (discussing the principle of permanent sovereignty over natural resources).

<sup>159</sup> CHURCHILL & LOWE, *supra* note 134, at 162.

<sup>160</sup> *Id.*

<sup>161</sup> Convention on Biological Diversity art. 15(1), *opened for signature* June 5, 1992, 1760 U.N.T.S. 152.

<sup>162</sup> See Australian Antarctic Territory Order in Council, *supra* note 129.

In Australia's case, however, there is the additional reason that its claim in Antarctica is limited to "sovereign rights." As detailed above, in laying claim to the territory Australia succeeded to as the AAT, the British Government merely asserted "sovereign rights" in Antarctica, not "sovereignty."<sup>163</sup> By definition, any extension of Australia's claim relates to sovereign rights. This means that in order for Article VI(2) to have any application for Australia, it must be directly applicable to claims to sovereign rights, including sovereign rights in an EEZ.

### B. Article VI

A key objection to maritime claims to an EEZ in Antarctica relies on the fact that under Article VI nothing in the Antarctic Treaty can "prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas" in Antarctica.<sup>164</sup> A number of states maintain that this means all Antarctic seas are to be considered high seas because there are no recognized sovereign coastal states within the ATS.<sup>165</sup> In other words, for the 187 states that do not recognise territorial claims in Antarctica, all marine areas adjacent to Antarctica are high seas because there are no coastal states.<sup>166</sup> The counter position, elaborated by Stuart Kaye and Don Rothwell, is that Article VI is silent about which seas are to be considered high seas under the Antarctic Treaty, and instead it should be "interpreted as merely seeking to preserve rights in those high seas, wherever they might be."<sup>167</sup>

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<sup>163</sup> See *supra* notes 129–131 and accompanying text.

<sup>164</sup> Antarctic Treaty, *supra* note 99. The convention applies in the area south of sixty degrees south latitude, including the oceans and all the areas claimed by Australia as falling within the AAT EEZ. See *id.*

<sup>165</sup> CHRISTOPHER C. JOYNER, *ANTARCTICA AND THE LAW OF THE SEA* 75 (1992). Another, less compelling argument given subsequent developments in the ATS, is that all Antarctic marine areas are high seas because the Antarctic Treaty was intended to address land and ice shelves only. Certainly the Antarctic Treaty parties themselves have consistently addressed Antarctic marine issues. See, e.g., Davor Vidas, *The Antarctic Treaty System and the Law of the Sea: A New Dimension Introduced by the Protocol*, in, *GOVERNING THE ANTARCTIC: THE EFFECTIVENESS AND LEGITIMACY OF THE ANTARCTIC TREATY SYSTEM* 61, 69 (Olav Schram Stokke & Davor Vidas eds., 1996); Bernard H. Oxman, *Antarctica and the New Law of the Sea*, 19 CORNELL INT'L L.J. 211, 228 (1986); M.J. Peterson, *Antarctic Implications of the New Law of the Sea*, 16 OCEAN DEV. & INT'L L. 137, 153 (1986).

<sup>166</sup> See, e.g., Note from the Embassy of the United States of America to the Australian Department of Foreign Affairs and Trade (March 31, 1995), as reprinted in 17 AUSTL. Y.B. INT'L L. 383, 383 (1996).

<sup>167</sup> Kaye & Rothwell, *supra* note 135, at 199.

For the argument here, let us accept *arguendo* Australia's territorial claim in Antarctica. Let us also accept that Article VI itself provides no guidance as to which seas south of sixty degrees south latitude are high seas. That does not mean, however, the area of high seas in the Antarctic Southern Ocean cannot be determined. As demonstrated above in connection with Antarctic EEZ claims, the existence of legal rights and obligations must be determined in light of the critical date of June 23, 1961.<sup>168</sup> Freedom on the high seas at that time could have been limited, at most, by a twelve nautical mile territorial sea.<sup>169</sup> Anything beyond that point, subject to the limited jurisdiction of the coastal state in the further contiguous zone, would have been deemed the high seas. Accordingly, the assertion of an EEZ in Antarctica that exceeds twelve nautical miles appears contrary to Article VI of the treaty.

### C. Article VIII and Jurisdiction

Even in the unlikely event that a declaration of an Antarctic EEZ is permissible, the exercise of jurisdiction over non-nationals (at least belonging to treaty parties such as Japan that do not recognise Antarctic claims) is prohibited either by Article VIII of the Antarctic Treaty, customary international law, or both. Turning to Article VIII first, it provides:

In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers . . . and scientific personnel . . . and members of the staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions.<sup>170</sup>

Clearly, as written, Article VIII only addresses observers, scientific personnel, and their staff. For these individuals, jurisdiction (prescriptive, adjudicative, and enforcement) can only be exercised by the state of nationality. This would be true of scientific personnel and

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<sup>168</sup> This is the date on which the Antarctic Treaty came into force.

<sup>169</sup> See *supra* note 144 and accompanying text.

<sup>170</sup> Antarctic Treaty, *supra* note 99.

their staffs engaged in research of the Antarctic marine ecosystem.<sup>171</sup> Because Kyodo is engaged in what it claims is “scientific” whaling under the International Convention for the Regulation of Whaling—a claim, as seen above, strongly disputed by many<sup>172</sup>—it might argue that Article VIII is directly applicable in the sense that those conducting the whaling for Kyodo are scientific personnel and their staff.<sup>173</sup> As such, Australia would have no international basis for the exercise of jurisdiction over Kyodo under the EPBC Act.

Regardless of the merits of this argument, the sounder and longer term view requires that jurisdiction in Antarctica over non-nationals (regardless of status) ordinarily be prohibited on other grounds. Looking to treaty interpretation, the practice of parties to the Antarctic Treaty, including Australia and all the other claimant states, has been consistently and uniformly to refrain from exercising adjudicative and enforcement jurisdiction over non-nationals of states party to the Antarctic Treaty. Extensive research (albeit and unfortunately limited to the English language) has failed to disclose any instance subsequent to the entry into force of the Antarctic Treaty where a state has prosecuted and punished (under civil law or criminal law) a non-national of a state party, without consent of the state of nationality, for action taken in the treaty area.

Under Article 31(3)(b) of the Vienna Convention on the Law of Treaties (Vienna Convention), nearly fifty years of apparently consistent practice by all states must have a bearing on how the parties view Article VIII of the Antarctic Treaty and on its proper interpretation.<sup>174</sup> The obvious and evident result of this long and consistent practice is that Article VIII is now to be interpreted as prohibiting, as against all

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<sup>171</sup> CHRISTOPHER C. JOYNER, *GOVERNING THE FROZEN COMMONS: THE ANTARCTIC REGIME AND ENVIRONMENTAL PROTECTION* 197–200 (1998) (discussing Antarctic scientific research being conducted in the treaty area).

<sup>172</sup> See, e.g., Peter H. Sand, *Japan’s “Research Whaling” in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)*, 17 REV. EUR. COMMUNITY & INT’L ENVTL. L. 56, 57–58 n.17 (2008); Triggs, *supra* note 36, at 36–37.

<sup>173</sup> On the “scientific” nature of Japanese whaling, which might give rise to claims that it involved scientific personnel and staff, see Eldon V.C. Greenberg, Paul S. Hoff & Michael I. Goulding, *Japan’s Whale Research Program and International Law*, 32 CAL. W. INT’L L.J. 151 (2002); Nobuyuki Yagi, *The Status of Scientific Research Whaling in International Law*, 8 ILSA J. INT’L & COMP. L. 487 (2002). See also Atsushi Ishii & Ayako Okubo, *An Alternative Explanation of Japan’s Whaling Diplomacy in the Post-Moratorium Era*, 10 J. INT’L WILDLIFE L. & POL’Y 55, 80–81 (2007).

<sup>174</sup> See Vienna Convention on the Law of Treaties art. 31(3)(b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (stating that interpretation of a treaty includes looking to “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

non-nationals, adjudicative and enforcement jurisdiction for acts or omissions in the treaty area. A similar, if somewhat reverse, application of Article 31(3)(b) of the Vienna Convention is analysed by Anthony Aust in connection with charter services under Article 5 of the Convention on International Civil Aviation.<sup>175</sup> Article 5:

does not require a charter airline to obtain permission to land en route, provided it does not pick up or set down passengers or cargo. However, the practice of the parties over many years has been to require charter airlines to seek permission to land in all cases, and the article is now so interpreted.<sup>176</sup>

Even if this interpretation of Article VIII of the Antarctic Treaty were to be rejected, an alternative argument militates in favour of limiting the exercise of adjudicative and enforcement jurisdiction to nationals in the Antarctic treaty area. This argument relies on customary international law. Just as the practice of states over time is important in the interpretation of a treaty, it is also a key element in the generation of customary international law.<sup>177</sup> In terms of practice, the uniform and consistent position of states, at least since 1961, if not before, has been to refrain from exercising adjudicatory or enforcement jurisdiction against non-nationals.<sup>178</sup> Just as importantly, all the claimant states, and in particular the “specially affected states” claiming Antarctic EEZs, have engaged in this practice of abstention.<sup>179</sup>

The more difficult question is why states have uniformly and consistently acted this way. The answer to this question is, of course, essential because of the need to establish the requisite *opinio juris* accompanying the practice. Accepting a positivist's view of the situation, only if the answer is that states are refraining to exercise adjudicatory and enforcement jurisdiction because of a sense of legal obligation,

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<sup>175</sup> Convention on International Civil Aviation art. 5, *opened for signature* Dec. 7, 1944, 61 Stat. 1181, 15 U.N.T.S. 295.

<sup>176</sup> ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 194 (2000) (citing Bin Cheng, *Air Law*, in 11 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 8–9 (1989)).

<sup>177</sup> I am not here concerned with the generation of custom by Article VIII of the Antarctic Treaty as a provision of a “fundamentally norm-creating character” *a la* the North Sea Continental Shelf Cases. See *North Sea Continental Shelf (F.R.G. v. Den.)*, 1969 I.C.J. 3, 16, 41–45 (Feb. 20).

<sup>178</sup> See REIN MÜLLERSON, *ORDERING ANARCHY: INTERNATIONAL LAW IN INTERNATIONAL SOCIETY* 213–17 (2000); Hugh Thirlway, *The Sources of International Law*, in *INTERNATIONAL LAW* 117, 124–30 (Malcolm D. Evans ed., 2003).

<sup>179</sup> On the importance of participation of states whose interests are specially affected, see Maurice Mendelson, *The Formation of Customary International Law*, 272 *RECUEIL DES COURS* 155 (1998).



can we conclude that a customary norm of preclusion of such exercise exists. I suspect that for the vast majority of states for which we could find evidence, the practice would be engaged in because of an underlying belief in its legal requirement.

### CONCLUSION

For those, like me, who oppose unsustainable commercial whaling (or any whaling of threatened species) there is an admitted attraction to possibilities of protective action for whales in the Southern Ocean under Australian law based on Australia's historic claims to sovereign rights in Antarctica. It would allow the circumvention of the apparently intractable paralysis in the IWC. It would allow for relatively quick independent third-party review and the order of any necessary interim and warranted permanent relief. Provided the necessary political will, it would allow for effective enforcement of any relief ordered. In all these matters, Australia and other states committed to the conservation of whales have much at stake.

But there are significant downsides that, in my view, outweigh the attractions of unilateral action under Australian law. Most importantly, the exercise of adjudicative and enforcement jurisdiction in the Antarctic AWS significantly risks, first, the continuing stability of the Antarctic Treaty System (ATS) and the broader environmental values it serves. As I have written, the long-running battle between the anti-whaling forces and whalers is being played out in Australian courts because of the failure to address the issues within what is seen as a "dysfunctional" whaling regime.<sup>180</sup> However, because the Australian litigation involves what most other states will view as the unlawful exercise of Australian jurisdiction in the Southern Ocean, there is a very real prospect that an ongoing whaling dispute will have a detrimental "ripple effect" on the ATS (and perhaps even beyond).<sup>181</sup> The danger is that the issue of whales and whaling might distort and obscure the larger environmental picture in Antarctica. Private litigation, based on an internationally disputed claim to sovereign rights over Antarctic territory and a further contested claim to an EEZ appurtenant to that territory, ought not to serve as a proxy for cooperative (and hopefully effective) international management of the Antarctic environment.

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<sup>180</sup> Anton, *supra* note 88, at 24.

<sup>181</sup> See Robert L. Friedheim, *Introduction: The IWC as a Contested Regime*, in TOWARD A SUSTAINABLE WHALING REGIME 3, 17, 27, 28 (Robert L. Friedheim, ed., 2001).

The negative incentives presented by the unilateral exercise of Australian jurisdiction over whales in the Southern Ocean are also dangerous. The exercise of jurisdiction by Australia over non-nationals and resources in the Antarctic AWS threatens in the longer term other jurisdictional claims over resources, and probably not for the conservation and protection of those resources, but for their exploitation. The big danger is that if other states follow Australia's lead in claiming sovereign rights and exercising attendant jurisdiction, the chances of natural resource over-exploitation and environmental harm in the Antarctic is increased. It will, I believe, in the long run exacerbate the likelihood of a scramble for important, scarce, and ultimately economically viable resources.

